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No. 92-___

In The

Supreme Court of the United States

October Term, 1991

SETTOON CONSTRUCTION, INC.,

Petitioner,

versus

CAROL J. DOMINGUE, JR.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Fifth Circuit err in approving interrogatories to the jury on Jones Act vessel and seaman's status where (1) Plaintiff, a construction worker, was associated with two successive flatdeck inland work barges, (2) a critical issue in the case was which barge was in use at the time of the injury, (3) the first interrogatory does not ask for separate or specific findings on vessel status of the two barges or the Plaintiff's relationship to each of them, and (4) the second interrogatory singles out one of the deck barges for a finding of unseaworthiness, ignoring the other?

II. Do the statements in *McDermott International, Inc. v. Wilander*, 498 U.S. ___, 111 S.Ct. 807, 818, 112 L.Ed.2d 866 (1991) and *Southwest Marine, Inc. v. Gizoni*, ___ U.S. ___, 112 S.Ct. 486, 491-92 (1991) that the inquiry into seaman status is of necessity fact-specific, is a mixed question of law and fact and is a matter as to which the Court must not abdicate its duty to ensure meaningful review, require a certain minimum of detail in the jury findings regarding the identity and nature of the vessel and the employee's precise relation to it, so that the reviewing court can determine whether or not the jury followed the law?

III. What is the detailed definition of the employment-related connection a worker must have with a vessel-in-navigation for seaman's status to result? Did the "performed substantial work" alternative of *Offshore v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), survive the "definite and permanent connection" requirement stated in *Wilander*, 111 S.Ct. 807 at 817?

IV. In the context of inland construction and oilfield workers using floating work platforms, what factors indicate

QUESTIONS PRESENTED FOR REVIEW – Continued

vessel-in-navigation status, and how does the nature of such an object or vessel interact with the worker's precise relation to it, to confer Jones Act status?

V. Does the rule of *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 4 (1963), as characterized in *Gizoni, supra*, require or permit exclusion of all Longshore Act references regardless of how the Plaintiff's counsel may have prejudiced the jury with arguments that the Plaintiff must either be compensated under the Jones Act or be sent away desperate?

LIST OF PARTIES

The following are the parties to this proceeding:

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Defendant-Petitioner

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DECISION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit (unpublished) upheld a jury verdict returned in the United States District Court for the Western District of Louisiana. The District Court denied defense motions for judgment notwithstanding the verdict and for a new trial. The Fifth Circuit affirmed in all respects. The District Court refused to give fact-specific jury charges, and to submit fact-specific jury interrogatories concerning "vessel" and "seaman" status, which were requested by Defendant. The District Court also suppressed, on motion of the Plaintiff, any mention of Longshore and Harbor Workers' Compensation Act[1] benefits as being "collateral source", and, after the Plaintiff's counsel, in his opening statement, told the jury that they would have to decide whether or not the Plaintiff would be compensated, or left in a desperate condition, the Defendant asked that Longshore evidence be allowed with a limiting instruction, which request was denied by the District Court.

JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 24, 1992. Defendant-Appellant's Petition for Panel Rehearing was denied on April 15, 1992. Consequently, jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. § 688(a):

> (a) Application of Railway Employee Statutes; Jurisdiction.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the

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[1] 33 U.S.C. §§ 901-950, hereinafter "Longshore Act" or "LHWCA".

right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G):

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include –

(G) a master or member of the crew of any vessel; . . .

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a):

The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by

the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.

STATEMENT OF THE CASE

Beginning Monday, June 20, 1988, Carol J. Domingue, Jr. (hereinafter "Domingue") began work for Settoon as a roustabout or laborer, working in various locations, some being marsh, some being swamp, and others being dry land. In locations where dry workspace was necessary but unavailable, Settoon leased flatdeck work barges for that purpose. Tugboats used to move the barges when necessary were operated and crewed by a separate company, Settoon Marine, Inc.

Two such barges are important to this case: one named the "Cathy S-1" and also known as the "pulling unit" barge, and the other was the "DB I", also known as the "crane barge". Both were simple rectangular inland flatdeck work barges lacking any navigational features such as self-propulsion, steering, navigation lights, galley, crew facilities, or quarters of any type. At all times when work was being performed on them, they were either moored or beached and immobile as Domingue testified the barge was at the time of his injury. The location was far inland and away from routes regularly used for the carriage of goods in commerce.

At trial, a factual discrepancy arose which was critical to the nature of the alleged vessel and Domingue's precise relation to it, but which the jury's findings do not resolve. Domingue was certain that his injury occurred on Friday, July 29th, after which he never returned to work. However, he was equally insistent that the injury occurred on the "pulling unit" barge, although he did not know its name at the time. All of the Jones Act negligence evidence, and all of the unseaworthiness evidence, attributed the unwitnessed injury to the lack of a crane on the "pulling unit" barge. However,

the contemporaneous field notations of both the Settoon foreman and the Conoco, Inc. project consultant corroborated the foreman's testimony that the "Cathy S-1" "pulling unit" barge was stripped of its power winch and cutting table and decommissioned on Friday, July 22nd, a day when Domingue was absent, and, from that day, moored stationary away from the ongoing work and used as a receptacle for pipe and debris. That testimony and documentation placed Domingue and his co-workers in association with the "DB I" or "crane barge", which had a mobile linkbelt crane on it at all times and was used for the week ending on July 29th.

The Defendant produced an eyewitness of an alleged football injury to Domingue on, or after, July 29, 1988, and eyewitnesses of a recreational weightlifting incident wherein Domingue did military squats with 120 pounds on his shoulders on July 19th. Domingue alleged neck, back, and knee injuries.

Settoon objected that the jury interrogatories framed by the Court failed to address the questions of the date of the injury and which barge was involved, but the Court overruled the objection[2] and submitted interrogatories which failed to address the date of injury and which presupposed that the injury did occur on the "Cathy S-1" or "pulling unit" barge. The District Court also refused to instruct the jury on the "sea-based/land-based" worker distinction drawn in *McDermott International, Inc. v. Wilander*[3]. The District Court also refused to submit proposed jury interrogatories which broke down the elements of the vessel-in-navigation tests and the elements of the worker's precise relationship to the alleged vessel.

Regarding Longshore and Harbor Workers' Compensation Act evidence, before trial, the Plaintiff's counsel obtained a ruling excluding such evidence as "collateral

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[2] Appendix VII, pp. 32-33.

[3] 498 U.S. ___, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991) (hereinafter "*Wilander*").

source",[4] then proceeded to tell the jury in his opening statement:

> "[Y]ou are going to be confronted with the question for you to decide whether or not he will be compensated or whether or not he will be left in the condition that he is in now, desperate. Thank you. I am sure you will do the right thing."[5]

Settoon reurged the point unsuccessfully after this opening of the door[6], and the jury specifically asked for this information but were denied it on the Court's own motion, although they were allowed to ask numerous other questions and receive answers.

The Fifth Circuit upheld the vessel status question on the basis of the movements of the barge "Cathy S-1" in the field, and the fact that there was evidence that it was not moored, but held stationary against the bank by a tugboat when Domingue said he was injured.[7]

The Fifth Circuit upheld the liability findings on the basis of a purported "boat log" of the tug "Ralph F" which indicated its association with the barge "Cathy S-1" during the week including July 29th.[8] That document was not identified or authenticated by any witness and was admitted over Settoon's objection.[9]

The Fifth Circuit upheld the exclusion of Longshore Act evidence, characterizing the District Court's ruling as one under F.R.E. 403 rather than the "collateral source" doctrine,[10] although the denial of Settoon's F.R.E. 403 objection to the showing of a video of the knee surgery was upheld.[11]

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[4] Appendix V, p. 24.

[5] Appendix V, p. 25.

[6] Appendix V, p. 25.

[7] Appendix I, p. 5.

[8] *Id.*, pp. 6-7.

[9] Appendix VIII, p. 34.

[10] Appendix I, p. 8.

[11] *Id.*, pp. 10-11.

ARGUMENT

REASONS FOR ALLOWANCE OF THE WRIT

Supreme Court Rule 10 sets forth indications of the character of reasons that will be considered by the Supreme Court, in its discretion, for granting a Writ of Certiorari. One of the stated reasons is when "a United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c).

Petitioner submits that, in three (3) separate respects, the Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. In each of these instances, the applicable Supreme Court decision is *Wilander*.

First, the Court in *Wilander* emphasized repeatedly that there is a fundamental distinction between land-based and sea-based maritime employees, that the Jones Act is intended for sea-based maritime employees, and the LHWCA is intended for land-based maritime employees, and stated:

> "The LHWCA restricted the definition of 'seaman' in the Jones Act only to the extent that 'seaman' has been taken to include land-based employees."[12]

It being made clear in *Wilander* that the land-based/sea-based distinction is the fundamental distinction intended by Congress in fashioning the mutually exclusive remedial statutes of the Jones Act and the LHWCA, Petitioner requested at trial herein that the jury be instructed regarding the land-based/sea-based distinction, and interrogated in the Verdict Sheet regarding Domingue's classification as between the two. By upholding the District Court's refusal even to mention the land-based/sea-based distinction to the jury, the Court of Appeals has decided that this distinction is so unimportant in the determination of Jones Act status that it merits no mention whatever to the jury who must make that determination. Petitioner submits that this decision is in conflict with the

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[12] *Id.*, 111 S.Ct. 807 at 817.

strong message in *Wilander* that the land-based/sea-based distinction is at the very heart of the Jones Act status issue.

Second, in *Wilander*, this Court approved a specific two-pronged test for the connection with a vessel-in-navigation which a maritime employee must have in order to be covered under the Jones Act. The Court quoted a 1938 Fifth Circuit case requiring "a definite and permanent connection with the vessel",[13] and noted that this test had previously been cited approvingly by the Supreme Court.[14] Settoon requested a jury charge incorporating the "definite and permanent connection" language, citing *Wilander* and the cases cited therein for this proposition.[15] The District Court rejected this two-pronged conjunctive test in favor of the two-pronged disjunctive test developed in the Fifth Circuit after 1938 and before *Wilander*.[16] That test instructs the jury to confer seaman's status if either (i) the Plaintiff was currently assigned to a vessel-in-navigation *or* (ii) performed a substantial amount of his work aboard such a vessel, thus contributing to its function or mission.[17] This charge, upheld by the Fifth Circuit herein, conflicts with this Court's teachings in *Wilander* in two respects: (i) the prongs are disjunctive rather than conjunctive and (ii) he "performed a substantial amount of work" language falls short of the "definite and permanent connection" requirement approved in *Wilander*.

Third, *Wilander* taught, and *Gizoni*[18] reaffirmed, that (i) "[t]he inquiry into seaman status is of necessity fact-specific; it would depend on the nature of the vessel, and the employee's precise relation to it", (ii) "the question of who is

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[13] *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (5th Cir. 1938), *quoted in Wilander, supra*, 111 S.Ct. 807 at 817.

[14] *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944), cited in *Wilander*, 111 S.Ct. at 817.

[15] Appendix IV, p. 22.

[16] Appendix II, p. 16.

[17] *Id.*

[18] *Southwest Marine, Inc. v. Gizoni*, ___ U.S. ___, 112 S.Ct. 486 (1991) (hereinafter "*Gizoni*").

a 'member of crew', and therefore who is a 'seaman', is better characterized as a mixed question of law and fact",[19] and (iii) "the Court must not abdicate its duty to determine if there is a reasonable basis to support the jury's conclusion".[20] In the present case, the Court of Appeals in effect concluded that these teachings do not require any more safeguards, in terms of the record for review of jury findings, than before when it was widely litanized that seaman status under the Jones Act was a question of fact for the jury alone.

In other respects, the decision of the Court of Appeals in this case has decided important questions of federal law which have not been, but should be, settled by this Court. This case presents a number of interrelated questions left open in the *Wilander* and *Gizoni* decisions.

First, in *Wilander*, the Court emphasized that the key to the mutual exclusivity of the LHWCA and the Jones Act was the distinction between land-based and sea-based employment.[21] The Court did not say whether a jury in a Jones Act case should be instructed in these terms regarding this distinction, and asked to draw it.

Second, in *Wilander*, the Court pointed out that Congress did not exclude from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea, but who did not aid in navigation.[22] The Court did not say whether or not Congress intended Jones Act remedies for those who (i) are not traditional seaman, (ii) owe nothing that could be considered allegiance like that of a sailor to his ship, and (iii) there is no "vessel at sea" but only a floating work platform in a wet place.

Third, in *Wilander*, the Court stated that the purpose of the traditional seaman's remedies is to compensate or offset the "special hazards and disadvantages to which they who go

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[19] *Wilander*, 111 S.Ct. 807 at 818; *Gizoni*, 112 S.Ct. 486 at 492-93.

[20] *Wilander*, 111 S.Ct. 807 at 818.

[21] *Id.* at 817.

[22] *Id.*

down to the sea in ships are subjected".[23] In some circuits, however, as in this case, workers are being adjudicated "seamen" again and again where there are no special hazards, no disadvantages, no sea, and no ships. Whether or not the special remedies available to seamen were intended to, or should be, applied to such cases has not been settled by this Court.

Fourth, in *Wilander*, the Court stated that "those with that 'peculiar relationship to the vessel' are covered by the Jones Act, regardless of what job they perform".[24] The Court did not say what that "peculiar relationship" must be, nor what is a "vessel" where that question is in doubt. The best indication given by the Court of the "peculiar relationship" is that there must be special allegiance to the vessel despite special maritime hazards. A uniform admiralty rule is needed on this question.

Fifth, in *Wilander*, the Court did say that the connection should be "definite and permanent". However, the Court further stated, "We are not called upon here to define this connection in all details. . . . "[25] This case asks for the detailed definition of that connection, and asks whether the "definite and permanent" two-pronged conjunctive test is the one which should be given to the Jones Act jury, rather than the "either/or" disjunctive test which will otherwise prevail.

Sixth, in *Wilander*, the Court noted that it was not asked to reconsider the rule that the jury's decision is final if it has a reasonable basis.[26] The Court did not say that the rule should not be reconsidered, or that the presence of *any* evidence supporting the jury's decision on seaman status requires upholding it. This petition does ask the Court to reconsider

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[23] *Id., quoting, Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 88, 66 S.Ct. 872, 882, 90 L.Ed. 1099 (1946) (Stone, C.J., dissenting).

[24] 111 S.Ct. 807 at 817.

[25] 111 S.Ct. 807 at 817.

[26] 111 S.Ct. 807 at 818.

this rule, and to set a standard for review more appropriate to the mixed question of law and fact which seaman status is.

Seventh, in *Wilander*, the Court does say that the question of seaman's status is properly characterized as a mixed question of law and fact, that the jury finds the facts and applies the legal standard, and that the Court must not abdicate its duty to determine if there is a reasonable basis to support the jury's conclusion.[27] The Court did not say what a court must do to fulfill this duty, in terms of jury instructions and interrogatories tailored to the fact-specific inquiry into seaman status and the employee's precise relation to a vessel, and subsequently, to review specific findings to determine whether the jury applied the correct legal standard. This case presents those questions.

Eighth, the Court notes, "We are not asked to determine if the jury could reasonably have found that Wilander had a sufficient connection to the GATES TIDE to be a 'seaman' under the Jones Act."[28] This petition does present the sufficiency of that connection as between Domingue and the floating work platform involved.

Ninth, in *Wilander*, the Court states, "We are not even asked whether the jury reasonably found that Wilander advanced the function or mission of the GATES TIDE."[29] In this case the Court of Appeals decided that question in the affirmative, where Domingue had less connection to the work platforms than did Wilander to the GATES TIDE. This petition asks whether there is sufficient connection to any vessel-in-navigation on the date of injury, and, if so, which one; whether the jury could have reasonably found that Domingue advanced its mission; and whether the jury could reasonably have found Jones Act negligence or unseaworthiness as to the vessel, if any, present on the date of injury.

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[27] *Id.*

[28] *Id.*

[29] *Id.*

The *Gizoni* decision makes clear that it is being under the Jones Act which excludes coverage under the LHWCA, rather than the other way around, so that summary judgment does not lie in a Jones Act case merely because LHWCA coverage would otherwise be certain. What *Gizoni* has to say about floating work platforms is far less clear. The most that can be gleaned is that, where the claimant is injured (i) by a defect fitting traditional notions of unseaworthiness, (ii) while the platform is underway, and (iii) being used to transport cargo, summary judgment is inappropriate.[30] The present case is not complicated by summary judgment posture, and asks for a uniform federal rule in that much-litigated question in brown-water seaman cases, namely, what is a "vessel-in-navigation" in the inland construction or oilfield context, and how should a jury be instructed and interrogated regarding the worker's precise relation to it?

Finally, *Gizoni* also characterized *Tipton v. Socony Mobil Oil Co.*[31] as establishing a rule that "it is reversible error to permit an employer to prove that the worker accepted LHWCA benefits while awaiting trial."[32] The Court did not address the reasons for such an exclusionary rule, or whether, under any circumstances, permitting its patent abuse by a plaintiff may also rise to the level of reversible error. This petition would place those questions before the Court.

IMPORTANCE OF CASE

The issues presented for decision in this case are those left unanswered by the *Wilander* and *Gizoni* Decisions. In circuits where the "aid-in-navigation" requirement for seaman's status had already been jettisoned, and where an occupation enumerated in the LHWCA was not seen as precluding Jones Act coverage, those who employ and insure workers

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[30] *See*, *Gizoni*, *supra* at n. 17, 112 S.Ct. 486 at 489-90 (rigging foreman's foot broke through hole in deck of barge during transport of ship's rudder; Court of Appeals determination that fact issues existed upheld).

[31] 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 4 (1963).

[32] *Gizoni*, 112 S.Ct. 486 at 493.

and equipment in, or near, brownwater settings face the same nagging questions: What is or is not a "vessel-in-navigation", and who is a "seaman" as to it, and when? Employees walk in and out of seaman status, just as objects move in and out of vessel status. Virtually every employer involved in construction or oilfield operations in marsh or wetland areas must now purchase two entirely different types of insurance coverage for each of its employees, and purchase protection and indemnity insurance for objects which may, or may not, be "vessels" for which such insurance is intended.

This continuing and unnecessary uncertainty enriches only those who live by litigation, and burdens all others, including the courts.[33] The uncertainty of the law in this area has created an unreasonable economic burden on the already-depressed industries of oil and gas exploration and production, and related construction and service sectors. The burden, of which insurance and liability are major portions, increases the cost of recovery of domestic petroleum and natural gas, thereby increasing the dependency of the United States on foreign and hostile energy sources.

The present uncertainty encourages litigation in several ways, and the detriment goes not only to those who must defend and pay the claims, but to those on whose behalf they are brought. In brownwater areas, the most marginal Jones Act claim is sure to be filed, because, to the plaintiff's attorney facing a hefty percentage contingent fee of a Jones Act recovery which includes nonpecuniary damages, as opposed to a workers' compensation remedy wherein the attorney's fees are both strictly regulated and deferred until

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[33] In 1987 and 1988, before *Wilander* broadened Jones Act status by eliminating the "aid in navigation" requirement imposed in some circuits, FELA and Jones Act cases accounted for about five percent of all civil trials and about eight percent of civil jury trials. *Report of the Federal Courts Study Committee* (April 2, 1990) Part II, Chapter 3, p. 62. These figures, and the overburden and delay already noted by commentators, will surely increase without a clearer delineation. *See*, Culp, *Fixing the Federal Courts*, ABA Journal, June 1990, p. 63; Kaufman, *Crisis in the Courts*, California Lawyer, August 1990, p. 28.

conclusion of the claim, the choice is obvious, even though electing the Jones Act remedy places the injured employee in jeopardy of receiving nothing in the event that negligence and unseaworthiness are found lacking.

Presently, those who defend maritime claims must advise their client, to the latter's astonishment, that he who sleeps at home in his own bed each night, never serves aboard a motor vessel, and faces none of the perils of the sea may well be adjudicated a seaman; that it is not a fair fight in a Jones Act case; that the skids are greased at every turn toward seaman status so that the decision ultimately rests, with few exceptions, in the hands of a jury which is institutionally misled about the alternatives for compensation available to such an employee.

The situation presents several opportunities for abuse. First, as stated above, is the enhanced risk of no recovery by the injured employee, who receives his advice on election of remedies from an attorney in inherent conflict of interest.[34] The strategy then often is to collect the generous compensation benefits of the LHWCA, both to finance the impending Jones Act litigation and to lull the owner of the floating work platform into unwariness until it is too late to seek a remedy in admiralty for limitation of, or exoneration from, shipowner's liability.[35] Trial by a jury, which has no idea of these behind-the-scenes considerations, is thus assured, since the well-drafted affidavit of the plaintiff, himself, is all that is necessary to create issues of fact.

Thus, the stage is set for the courtroom drama, in which there is great danger in Jones Act cases that juries will tend to ignore the proper legal standard, particularly if there is no built-in means for the courts to review effectively the status question. Even the least sophisticated juror can see that the plaintiff's attorney, who wants the young injured person to

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[34] *See*, Bull, *Seaman Status Applied: A Practice Guide to Status Determination*, 1 U.S.F. Maritime Law Journal 43, 113 (1989).

[35] Limitation of Shipowner's Liability Act, 46 U.S.C. § 181 *et seq.* (six-month limitation of action by owner).

receive money, is arguing vehemently that the fellow was a seaman, while the defense attorney, who opposes the injured person receiving anything, is just as insistent that the employee is not a seaman. Clearly, the juror infers that, for the injured person to receive any compensation at all, the jury must find that he or she is a seaman as to a vessel-in-navigation. Thus, the danger of having no fact-specific jury findings and meaningful control by the Court through directed verdict and judgment notwithstanding the verdict is exacerbated by the belief in some courts that there is an absolute prohibition against LHWCA evidence, thereby further increasing the intense pressure inside the jury room to "fudge" on status.

Further funneling what should be a search for the truth toward a skewed result is the practice of giving juries an over-expansive definition of the term "seaman", neither requiring the connection to a vessel to be permanent, nor definite. Allowed to make the plaintiff a seaman merely on the basis of his performing a "substantial amount of work" in furtherance of the mission of something which might arguably be called a "vessel", the jury is naturally tempted to consider anything "substantial", since by now it has reasonably concluded that, without such findings, both on the substantiality of the connection and the characterization of the object as a "vessel", the injured person will take nothing and the employer will get off scot-free. These practices result in a system that is ultimately corrupt, unjust, and exorbitantly expensive.

In order to seek some measure of protection for themselves, defendants and potential defendants in such claims, in search of a more objective forum and a fairer mode and manner of trial, sometimes hasten the dispute to litigation through use of the Declaratory Judgment Act[36], the Limitation

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[36] 28 U.S.C. §§ 2201-02; *see, e.g., Torch, Inc. v. Theriot*, 727 F.Supp. 1048 (E.D. La. 1990).

of Liability Act[37], and now, after the *Gizoni* decision, are likely to be tempted to press the question of Longshore coverage to final adjudication for persuasive, if not preclusive, effect.[38]

State legislatures being heavily influenced by the plaintiff bar have even attempted in some instances to give the plaintiff exclusive control over the mode of trial in maritime cases brought under the "saving the suitors" clause[39], leaving the hapless defendant with neither an Article III judge[40], nor the right to trial by jury.[41]

Naturally, the potential for abuse would be greatly diminished if there were meaningful judicial review. The declaration in *Wilander* that seaman's status is a mixed question of law and fact and a highly fact-specific inquiry, plus the abjuration of the courts not to abdicate their duty to determine if there is a reasonable basis to support the jury's conclusion, opens the way for the formulation and implementation of safeguards which go a long way toward stemming the abuse, as well as the honest but costly uncertainty which will persist if the district courts and courts of appeals are to continue to do as they have done in this case.

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[37] *See*, n. 32, *supra*. For a discussion of strategic use of the Limitation Act, see *Complaint of Cameron Boat Rentals, Inc.*, 683 F.Supp. 577, 582 n. 6 (W.D. La. 1988).

[38] *See*, *Gizoni*, 112 S.Ct. 486 at 493-94.

[39] Of 28 U.S.C. § 1333.

[40] *See*, U.S. Const. art. III (federal judiciary).

[41] *See*, *e.g.* the following:

A trial by jury shall not be available in:

* * *

(6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

La. Code Civ. Proc. Art. 1732 (as amended by La. Acts 1988, No. 147); *cf.* U.S. Const. amend. VII (right to trial by jury).

THE CURRENT STATE OF THE LAW

A. THE "CONNECTION" PRONG OF THE SEAMAN STATUS TEST.

The courts struggling with the seaman status test after *Wilander* have already misapprehended what that case has to say about *Offshore Co. v. Robison.*[42] Therefore, it is necessary to begin this study with a detailed look at what *Wilander* did say about *Robison.*

First, the Court noted that, at trial, the jury was given a special interrogatory asking whether or not Wilander was either permanently assigned to, or performed a substantial amount of work aboard, the GATES TIDE.[43] The Court next points out that McDermott did not ask for review of the "substantial amount of work" route to seaman status, but only asked the Court to reject the "contributed to the function" route in favor of the "aid in navigation" requirement.[44]

The remaining discussion of *Robison* is that, in that case, the Fifth Circuit attempted to decipher Supreme Court cases and correctly concluded that "aid in navigation" was not a requirement. Regarding the nature of the required connection between the worker and a vessel-in-navigation, however, the Supreme Court points out in the next paragraph that it has already approved pre-*Robison* Fifth Circuit language stating that there must be "a definite and permanent connection with the vessel" for the worker to have seaman status.[45] The Court

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[42] 266 F.2d 769 (5th Cir. 1959) (hereinafter "*Robison*").

[43] 111 S.Ct. at 809. Compare the present case, where the jury was simply asked: "Was plaintiff a member of a crew of a vessel and a seaman for Jones Act purposes?" Appendix III.

[44] Of *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984). *See*, 111 S.Ct. at 809-10.

[45] 111 S.Ct. at 817, *citing*, *Norton v. Warner Co.*, 321 U.S. 565, 573, 64 S.Ct. 747, 751, 88 L.Ed. 931 (1944), and *quoting*, *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (5th Cir. 1938).

then repeats the fact that it is not asked to determine the sufficiency of Wilander's connection to the GATES TIDE.[46]

Therefore, after *Wilander*, the only "connection" language specifically approved by the Supreme Court is that it must be both "definite" and "permanent". In contrast, *Robison* waters down "permanent" by preceding it with "more or less", and provides an escape from the permanence requirement altogether by providing a disjunctive, alternate route to status whereby the worker is a seaman if he or she "performed a substantial amount of work aboard" such vessel. This is a far cry from what was approved by the Supreme Court in *Wilander* and *Norton*, since "substantial amount of work" is neither "definite" nor "permanent". Nevertheless, several courts misapprehend *Wilander* to signify a wholesale endorsement of the *Robison* test, although some of them reach this conclusion uneasily.

The gloss placed, over time, on the second prong of the *Robison* test has made it weaker than *Wilander* seems to counsel with its stern phrase, "we hold that a necessary element of the connection is that a seaman perform the work of a vessel."[47] *Any* person employed on a vessel could be deemed to further its enterprise.[48]

Not surprisingly, the *Robison* test's parent, the Fifth Circuit, hails *Wilander* as having completely endorsed it. *See*, *Palmer v. Fayard Moving and Transportation Corp.*[49] That

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[46] 111 S.Ct. at 818.

[47] 111 S.Ct. 807 at 817.

[48] *See, e.g., Dean v. McKie Co.*, 771 F.Supp 466, 472 (D. Mass. 1991) and Ninth Circuit cases cited therein (actors, bartenders, musicians); *see infra.* n. 54, *DiGiovanni II*, No. 91-1957, slip op. at 9 (1st Cir. March 4, 1992) (Torruella, J., dissenting) ("Under *Wilander*, a dance instructor teaching passengers the "cha-cha-cha" aboard an ocean liner tied to the dock is a "seaman"). The examples in these cases are, at least, exposed to the perils of the sea, and are not land-based when on duty. The inland oilfield or construction worker who is on and off a floating work platform in the course of his day is another matter.

[49] 930 F.2d 437, 439 (5th Cir. 1991).

case is interesting because it quickly concludes there was no permanent assignment to the vessel in question, and focuses on the "substantial part [of work]" portion of the *Robison* test. Even though Palmer admitted she was primarily a land-based public relations employee, it appears that, if she could have shown that "twenty to thirty percent" of her work had been aboard the vessel, seaman status would have gone to the jury.[50] It is apparent that the *Robison* test, at least as applied in the Fifth Circuit, has become a way to permit juries to confer seaman status on land-based employees with no definite and permanent connection with the vessel.

Other circuits are placing different emphasis on other parts of the complete and original *Robison* charge. The Sixth Circuit in *Boyd v. Ford Motor Co.*[51] opines that the Supreme Court "has approved the Fifth Circuit's test from *Offshore Co. v. Robison*"[52], but, in that case, the Sixth Circuit places the emphasis on the tail end of the original *Robison* charge, often absent from more recent Fifth Circuit recitations, which states "or to the operation or welfare of the vessel in terms of its maintenance *during its movement or during anchorage for its future trips*".[53]

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[50] The "twenty to thirty percent" range is apparently important, because the Court notes that a fixed twenty percent was held too little in *Ward v. Reeled Tubing, Inc.*, 637 F.Supp. 33, 37-38 (E.D. La. 1986), and Palmer's assertion was that she spent only nineteen percent of her time on vessel-related work. 930 F.2d 437 at 439. *See also, Easely v. Southern Shipbuilding Corp.*, 936 F.2d 839 (5th Cir. 1991), which was decided after *Wilander*, but before *Gizoni*. The case turns on the now-overruled *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied* 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), however, despite the outmoded reasoning, one can be sure that the result would now be upheld under *Robison*, because, in Note 1, the Court points out that the plaintiff stated he spent eleven percent of his time aboard his employer's vessels. 936 F.2d 839 at 841, n. 1.

[51] 948 F.2d 283 (6th Cir. 1991).

[52] *Boyd, supra*, 948 F.2d at 288.

[53] *Id., quoting Offshore Co. v. Robison, supra* (emphasis added by the 6th Cir.).

The First Circuit's most recent study of the status problem contains no discussion of the alternative "substantial work" prong of *Robison*, which allows the suitor to escape the "definite and permanent" requirement approved in *Norton v. Warner Co.* and *Wilander*.[54] Rather, the First Circuit is more concerned with *Wilander*'s emphasis on the land-based/sea-based distinction and the particular perils faced by those who live their lives upon the sea, *i.e.*, the common sense and policy reasons for making one worker a seaman and another one not.

Some courts are confused after *Wilander*, and particularly after *Gizoni*, whether any "connection" requirement remains at all, or whether exceptions exist for some Jones Act litigants. There currently is a split among the circuits in the river and harbor pilot cases. Such pilots lack Jones Act status for want of a sufficient connection or attachment to the vessel in the Fifth Circuit[55], and in the Fourth Circuit[56], while in the First Circuit, such pilots are held to come under an exception to the connection requirement because their seaman status is conferred by federal maritime law which pre-dates and survives the Jones Act.[57]

More disturbing is the recent statement by the Supreme Court of Louisiana, a state where many Jones Act cases are

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[54] *See, DiGiovanni v. Traylor Brothers, Inc.*, No. 91-1957, slip op. at 9, ___ F.2d ___, 60 U.S.L.W. 2583 (1st Cir. March 4, 1992) (*en banc*) ("DiGiovanni II").

[55] *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322 (5th Cir. 1991) ("Bach I"), certiorari granted and remanded for futher consideration in light of *Wilander*, ___ U.S. ___, 111 S.Ct. 2253 (1991), *on remand*, 947 F.2d 1290 (5th Cir. 1991) ("Bach II").

[56] *Harwood v. Partredereit af 15.5.81*, 944 F.2d 1187 (4th Cir. 1991).

[57] *Evans v. United Arab Shipping Co.*, 767 F.Supp. 1284 (D.N.J. 1991). The Court, in *Evans*, adopts the assenting opinion of Fifth Circuit Judge John R. Brown in Bach I, who, in turn, approved the *Evans* case in his second descent in Bach II, *see*, 920 F.2d 322 at 327 (Brown, J., dissenting) and 947 F.2d 1290 at 1291- 92 (Brown, J., concurring and dissenting). The river/harbor pilot status issue is not presented by this petition.

tried, that the "attachment" or "connection" prong of the seaman status test did not survive *Gizoni*.[58]

Clearly, with *Wilander* teaching that the worker must have a "definite and permanent" connection, *Robison*, which is widely seen as being approved in *Wilander*, permitting avoidance of such requirement with its "substantial work" alternative, and the Louisiana Supreme Court believing that *Gizoni* has sounded the death knell for the attachment requirement altogether, there is a problem in the current state of the law on this issue.[59]

B. VESSEL STATUS OF FLOATING WORK PLATFORMS.

The Fifth Circuit, where most floating work platform cases are litigated, has by far the largest body of law on this issue, but, because its tests and factors are backed by no guiding purpose, such as the distinction between land-based and sea-based workers, the issue is litigated over and over, with the cases yielding inconsistent results. The leading case, *Gremillion v. Gulf Coast Catering Co.*,[60] contains three different tests for vessel-in-navigation status, one being a six-point

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[58] *Southwest Marine v. Gizoni*, ___ U.S. ___, 112 S.Ct. 46, 116 L.Ed.2d 405 (1991), held that a rigging foreman employed in ship repair, who rode on floating platforms, was not excluded from seaman status. Although Gizoni only "rode" the platforms during working hours, the United States Supreme Court concluded that the status as a Jones Act seaman was a jury question. *Gizoni* casts further doubt on the more or less permanent attachment aspect of *Robison*, *Barrett [v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (*en banc*)] and *Bach*.

Folse v. Western Atlas International, Inc., 593 So.2d 341, 343 (La. 1992) (Seismic operator stated jury question regarding his alleged seaman's status as to supply vessel.)

[59] Perhaps the only case thus far to examine *Wilander*'s discussion of *Norton* and the "definite and permanent connection" language is *Evans v. United Arab Shipping Co.*, *supra* at n. 57, 767 F.Supp. 1284 at 1289.

[60] 904 F.2d 290 (5th Cir. 1990).

test[61], a "three common attributes for non-vessels" test[62], and a "nine factors for vessel status" test.[63] This proliferation of factors and tests has not helped parties resolve their disputes outside of court.[64] At the same time, the Fifth Circuit jurisprudence institutionalizes the submission of marginal cases to juries, without saying how the jury findings must be stated or reviewed.[65] The liberal submission of marginal claims to the jury promotes a fallacy, since it is the remedy which should be expansive for the seaman, not access to it by those who Congress never intended to be included within the term.

Because of the tendency of juries to provide a remedy where they are led to believe there will otherwise be none, virtually all of the case law placing any limitations on "vessel-in-navigation" status arises in the context of summary

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[61] *See*, 904 F.2d 290 at 293: (i) navigational aides, (ii) life boats and other life-saving equipment, (iii) a raked bow, (iv) bilge pumps, (v) crew quarters, and (vi) registration with the Coast Guard as a vessel.

[62] (i) the structure is constructed to be used primarily as a work platform; (ii) the structure is moored or otherwise secured at the time of the accident; and (iii) although the platform is capable of movement and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose, *see*, 904 F.2d 290 at 293-94.

[63] This test adds to the first six factors the following: (vii) intentions of the owner to move the structure on a regular basis; (viii) ability of the submerged structure to be refloated despite years of corrosion and deterioration; and (ix) length of time the structure has remained stationary. *Johnson v. Odeco Oil and Gas Co.*, 864 F.2d 40, 43 (5th Cir. 1989), ref'd in *Gremillion*, *supra*, 904 F.2d at 294, n. 9.

[64] *See, e.g., Ducote v. V. Keeler & Co., Inc.*, 953 F.2d 1000, 1001 (5th Cir. 1992) ("This case presents a recurring question in Jones Act disputes: What is a vessel?").

[65] *See, id.*, 953 F.2d 1000 at 1002 ("The Jones Act does not define the term "vessel", and this Court has repeatedly held that the term of incapable of precise definition. Because of this imprecision, the question whether a floating structure is a vessel is fact-specific and is usually left to the jury. Furthermore, because of the policy of providing an expansive remedy for seamen, even *marginal claims* are properly left for jury determination.") (emphasis added, footnotes omitted).

judgment. And, ironically, summary judgments are affirmed under circumstances where jury verdicts would typically be upheld. In *Gremillion*,[66] the vessel in question had two decks, was towed from place to place, and spudded down. It had eating, sleeping, and recreational facilities. It was advertised by the owner as having blue-water capability. It was designed to service oil companies working inland waterways and shallow offshore areas. It did have navigational lights.[67] The problem of meaningful post-trial review is painfully apparent where the structure in *Gremillion* was not a vessel as a matter of law on summary judgment, but the far less elaborate object involved in the present case could reasonably have been found by the jury to be a vessel in navigation.

Another example is *Ellender v. Kiva Construction Co.*,[68] where the structure had living quarters, no means of transportation of its own, and was periodically repositioned by tugs. Like the present case, the workers were moved to and from the job site, where the barge was used, by other boats, and the barge was anchored in calm waters at the time of the injury, comparing to the platform in this case being beached on the bank, if not moored, and definitely not in transit at the time of the injury. The difference appears to be that, in *Gremillion* and *Ellender*, as with so many other cases, a Motion for Summary Judgment was granted in the defendant's favor, whereas, in this case, it was not. The upshot is that, if the District Court fails to grant summary judgment, the reviewing court defers to the jury's findings, inscrutable though they may be, and does not necessarily follow its own rules.

A further illustration is *Michel v. Total Transportation, Inc.*[69] That case pays tribute to the *Wilander* "fact-specific" and "mixed question" language, but uses the same old disjunctive *Robison* test for status, citing *Gremillion* for this

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[66] *See*, n. 55, *supra*, and accompanying text.

[67] 904 F.2d 290 at 291 and n. 2.

[68] 909 F.2d 803 (5th Cir. 1990).

[69] 957 F.2d 186 (5th Cir. 1992).

rule. However, it was a non-jury case. The Court found as fact that the barge had all six of the *Bernard v. Binnings*[70] features. In the present case, we have no factual findings at all, but the record viewed most favorably to the plaintiff reveals that the work platform had only two out of the six *Bernard* factors, and was not underway at the time of the injury.

The "transportation function" aspect of the Fifth Circuit rule also seems to be a moving target. Compare the suggestion that, if the object's "transportation function remains subordinate to its contrasting function[s]", the craft may not be classified as a vessel[71], with the phrase "transportation function is merely incidental to the platform's primary purpose,"[72] and the notion that an object may be a vessel if transportation is a "significant component of its purpose".[73] It would logically seem that a function which could be "not merely incidental" or even "a significant component" could nevertheless "[r]emain subordinate to its contrasting function of providing [a place to stand] in shallow waters".[74] The difference seems to be that, if a summary judgment for the defense is to be upheld, then the transportation function was "subordinate", but, if a jury finding of vessel status is to be upheld, then the transportation function was "not merely incidental". Such semantic conundrums do nothing to address the problem at hand, which is the separation of sea-based employees into Jones Act coverage, and land-based employees into LHWCA coverage.

The First Circuit adopts a better-reasoned approach in *DiGiovanni II*.[75] Although ostensibly approving the tests

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[70] *Bernard v. Binnings Construction Co.*, 741 F.2d 824, 832 (5th Cir. 1984), *see*, n. 56, *supra.*

[71] *Gremillion*, 904 F.2d at 294 n. 9, quoted in *DiGiovanni v. Traylor Brothers, Inc.*, 1991 Westlaw 50658 (1st Cir. 1991) ("DiGiovanni I") (withdrawn an opinion *en banc* issued March 4, 1992).

[72] *Gremillion*, 904 F.2d at 293-94.

[73] Appendix I, p. 5.

[74] *Cf.*, 904 F.2d at 294, n. 9.

[75] *DiGiovanni v. Traylor Brothers, Inc.*, *supra* at n. 49.

stated in *Gremillion*, the First Circuit formulates a significantly different test, one with a purpose toward furthering Congressional policy. Reviewing *Wilander*, the First Circuit focuses on the Supreme Court's emphasis on "voyage", "navigation", and the "particular perils [of the sea]".[76] Regarding *Gizoni*, the First Circuit observed that the plaintiff in that case had been involved handling lines and signaling the tugs while the platform he was on was engaged in transporting a rudder to a ship when his foot went through the deck.[77]

What the First Circuit interjects into the analysis, which reconciles the vessel-in-navigation question with the Congressional policy of providing the LHWCA for land-based workers and the Jones Act for sea-based workers, is the focus on whether or not the worker is assigned to the floating platform for "its shore enterprise". The Court states:

> "A worker becomes a seaman not by reason of the physical characteristics of the structure to which he is attached, but because its being operational 'in navigation' exposes him to 'a seaman's hazards'. He is not exposed by what the vessel did in the past, or by its future potential, and to give him these special benefits by mechanical definitions without the exposure is misplaced generosity. . . . In sum, if a barge, or other float's purpose or primary business is not navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit."[78]

DiGiovanni II is also interesting for what it says about the way the jury interrogatories were handled:

> "The Court put alternative questions to the jury, posing simple negligence under the LHWCA if the

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[76] *Id.*, slip op. at 1.

[77] "The platform . . . at the time of plaintiff's injury, was engaged in transportation, and plaintiff was a participant in that operation." *Id.*, slip op. at 4.

[78] *Id.*, slip op. at 3-4 (quotations omitted).

jury did not answer the Jones Act questions favorably."[79]

Although the First Circuit says that it is adopting the Fifth Circuit view, it goes much further, holding that, if a special purpose work platform's *primary* business is not navigation, then workers assigned thereto for its *shore enterprise* are to be considered seamen *only when it is in actual navigation or transit*. This is a far cry from the result in the present case, where the worker assigned to a shore enterprise is held a seaman even though the platform is not in actual transit, simply because there was a rational basis in the record for a jury finding that the platform's transportation function was "not merely incidental" to its primary purpose as a work platform. Petitioner submits that the First Circuit's focus on the land-based/sea-based distinction, the exposures to the particular perils of the sea, and whether or not the work being done was a "shore enterprise", provides the missing elements, the absence of which permits this issue to drift endlessly in litigation, failing to achieve the purposes of Congress or the teachings of *Wilander*.

C. *TIPTON V. SOCONY MOBILE OIL* AND THE PROBLEM OF PREJUDICE AGAINST JONES ACT DEFENDANTS.

The unfortunate context of the Court's approval in *Gizoni*[80] of the holding in *Tipton v. Socony Mobil Oil Co.*[81] worsens the plight of those defending marginal Jones Act cases. The danger of having no fact-specific jury findings and meaningful control by the court through directed verdict and JNOV is exacerbated by the prohibition against LHWCA evidence of the *Tipton* "collateral source" rule, which craves a little scrutiny.

Tipton is a short *per curiam* opinion, based in part on the District Court's failure to include a limiting or cautionary

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[79] *Id.*, slip op. at 4.

[80] 112 S.Ct. 486 at 493.

[81] 375 U.S. 34, 37, 84 S.Ct. 1, 3, 11 L.Ed.2d 4 (1963).

instruction along with admission of the longshore evidence, and the fact that the District Court held forth at length on the LHWCA in its charge to the jury.[82] *Tipton* does not discuss the reason for the rule, except to say that such evidence was prejudicial and may have been considered by the jury to be "dispositive of the ultimate fact of whether he was a seaman".[83] At the Court of Appeals level, dissenting Judge John R. Brown was of the opinion that the error was not harmless, and in so stating, cited an article on the collateral source rule.[84] Six years later, however, Judge Brown correctly stated for a unanimous panel:

> Shipowner seeks to recover from the seaman the compensation benefits erroneously paid under the Longshoreman's Act. . . . Because the payments were made by the employer and not a third party, we are not faced with the usual problems of the collateral source doctrine.[85]

Many cases citing *Tipton* and its companion case, *Eichel v. New York Central Railroad*[86], concerned the inadmissibility of benefits not originating, either precisely or at all, with the defendant-employer.[87]

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[82] *See*, 84 S.Ct. at 2.

[83] *Id.*

[84] *Tipton v. Socony Mobil Oil Co.*, 315 F.2d 660 at 664 and n. 6 (5th Cir. 1963).

[85] *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679 (5th Cir. 1969). *Massey* continues to be the law of the Fifth and Eleventh Circuits, and elsewhere. *See, e.g., Miron v. All Alaska Seafoods, Inc.*, 705 F.Supp. 518, 519 (W.D. Wash. 1988); *Bender v. Board of Governors*, 728 F.Supp. 839, 843 n. 8 (D.R.I. 1990).

[86] 375 U.S. 253, 845 S.Ct. 316 (1963).

[87] *E.g. Wilcox v. Clinchfield Railroad Co.*, 747 F.2d 1059 (6th Cir. 1984); *Page v. St. Louis Southwestern*, 349 F.2d 820 (5th Cir. 1965) (Railroad Retirement Act benefits); *Blake v. Delaware and Hudson Railway Co.*, 484 F.2d 204 (2nd Cir. 1973) (group hospitalization insurance); *Simmons v. Hoegh Lines*, 784 F.2d 1234 (5th Cir. 1986), *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977); *Gates v. Shell Offshore, Inc.*, 812 F.2d 1509 (5th Cir. 1987) (longshoreman suit against non-employer for vessel negligence);

(Continued on following page)

Recently, in *Reed v. Philadelphia, Bethlehem and New England Railroad Co.*[88], the Third Circuit openly criticized the collateral source rule of *Tipton* and *Eichel.*[89] For its part, the Fifth Circuit has recognized that prejudice can cut both ways, and that *Tipton* did not create a *per se* rule of inadmissibility of benefit payments in Jones Act cases. In *Savoie v. Otto Candies, Inc.*[90], the Court held it was not error to introduce, for the express purpose of proving his status, that maintenance was paid to the plaintiff. A limiting instruction was also given, and the Court stated that, while a more extensive or explicit limiting instruction may have been desirable, the burden of requesting it was on the objecting party.[91]

Directly on point here is *Lange v. Missouri Pacific Railroad Co.*[92] In that case, the plaintiff testified on direct examination, over defense objection, that he returned to work immediately after his back surgery only because he had to support his family and had no savings or disability income. Thereafter, with the Court's permission, defense counsel elicited testimony from the plaintiff that he applied for and received a lump sum payment for retroactive workers' compensation benefits. Affirming, the Court of Appeals held that the benefits were admissible as impeachment evidence, and that the evidence "was also necessary to protect the full range of inquiry allowed by cross-examination, a fundamental part of the adversary system."[93]

(Continued from previous page)

Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525 (9th Cir. 1962) (California Disability Fund to which Jones Act employer made no contribution).

[88] 939 F.2d 128 (3rd Cir. 1991).

[89] *See*, 939 F.2d at 134 and n. 3.

[90] 692 F.2d 363 (5th Cir. 1982).

[91] 692 F.2d at 369-71.

[92] 703 F.2d 322 (8th Cir. 1983).

[93] 703 F.2d at 323-24.

The impeachment exception set forth in *Lange* is acknowledged by the Fifth Circuit in *Gates v. Shell Oil*[94], which also discusses the *Savoie* status exception and the malingering exceptions recognized by the U.S. First Circuit and the Louisiana state courts.

If the *Tipton* rule is to control (even where, as here, the plaintiff opened the door, but the defendant was prohibited from walking through it), then other safeguards are necessary to prevent miscarriage of justice in many Jones Act cases where status is an issue. Therefore, we ask that, *if* the plaintiff will be permitted to argue without rebuttal that either the jury will find him a seaman or they will be sending him away "desperate", *if* the defense is to be required to disclose impeachment evidence while the plaintiff is still testifying, and *if* a surgery video is to be shown to the jury, and so on, *then* the trial court's duty as set forth in *Wilander* and *Gizoni*, to have the jury decide the specific facts of status and stick to the law, at least encompasses a duty to submit interrogatories to the jury which are adequately detailed and sufficient in number to enable the Court to safeguard through JNOV against the cumulative prejudices which tend to pressure and skew a jury toward a sympathy verdict on status. Appellant submits that the instructions and interrogatories it submitted and preserved in this case are what the Supreme Court in *Gizoni* and *Wilander* now contemplates and requires.[95]

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[94] *Supra* at n. 81, 812 F.2d 1509, 1513 and n. 3.

[95] It is practically impossible to determine statistically the average probability that a contested-status Jones Act case being submitted to a jury will result in a finding of coverage, however, Petitioner has conducted a Westlaw computer search to give some indication. Only twenty cases, including *Tipton*, were recovered from the "allfeds" database using the following query: "Jones Act" & jury /s found /s not /2 seaman. By contrast, one hundred eleven documents, including *Wilander*, were yielded by the following query: "Jones Act" & jury /s found /2 seaman.

CONCLUSION: FIFTH CIRCUIT ERROR IN LIGHT OF SUPREME COURT AND CIRCUIT LAW

The errors made below are referenced throughout this petition and need not be belabored here, but only summarized. The Fifth Circuit upheld the trial court in refusing jury charges on the *Wilander* "definite and permanent connection" requirement, and instead gave the modified-*Robison* "performed substantial work" back-door alternative to seaman status, refused all instructions regarding the land-based/sea-based distinction, and refused to instruct the jury on all of the relevant factors for consideration whether or not a floating platform is a "vessel in navigation". The entire status charge given was: "The key to seaman's status is employment-related connection to a vessel in navigation. If plaintiff was either currently assigned to such a vessel or performed a substantial amount of his work aboard such a vessel, and the performance of his duties contributed to the function of that vessel or to the accomplishment of the vessel's mission, then he is a seaman for Jones Act purposes." The entire jury interrogatory on Jones Act status was: "Was plaintiff a member of a crew of a vessel and a seaman for Jones Act purposes?" Every suggestion for specific factual findings for the jury befitting the fact-specific nature of the question as decreed in *Wilander*, was rejected. Moreover, no reference whatever to the alternate status or remedies of the LHWCA was permitted, despite the fact that Plaintiff's counsel had plainly implied that, either Domingue would be made a seaman, or he would go away "desperate". The result was a proceeding fraught with prejudice, but having no safeguards in the record to permit meaningful judicial supervision over this mixed question as mandated in *Wilander*.

Petitioner therefore requests that the Court reject the "substantial work" alternative route to Jones Act status in favor of the "definite and permanent connection" requirement approved in *Wilander* and *Norton*, or alternatively, to modify the "substantial work" prong to make clear that only such work may be considered as would expose the worker to the peculiar perils of the sea, and prevent this route from being a

means of wholesale entry of land-based workers into coverage by the Jones Act. The same land-based/sea-based distinction should govern the inquiry into the "vessel-in-navigation" status of floating work platforms, and the overriding criteria there should be "shoreside operation" and whether or not the craft was in actual transit at the time of injury. Finally, where a Jones Act suitor abuses the protection of *Tipton*, Longshore Act evidence should come in with a limiting instruction. The Fifth Circuit decision to the contrary should be reversed.

DATED: June 1, 1992.

Respectfully submitted,

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APPENDIX I

COURT OF APPEALS OPINION, DENIAL OF REHEARING, TRIAL COURT RULING ON POST-TRIAL MOTIONS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-4420

CAROL J. DOMINGUE, JR.,
and CHRISTINE G. DOMINGUE,

Plaintiffs-Appellees,

versus

SETTOON MARINE, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

(CV-88-2398)

(March 24, 1992)

Before THORNBERRY, KING, and DEMOSS, Circuit Judges.

THORNBERRY, Circuit Judge:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendant-Appellant Settoon Construction, Inc. appeals the district court's entry of a jury verdict in a Jones Act case. Finding no error, we affirm.

Background

In June of 1988, Plaintiff-Appellee Carol Domingue, Jr. began working for Settoon Construction, Inc. as a construction laborer. On July 4, 1988, Domingue was assigned to the crew of the Cathy S-1, a flat deck barge powered by the tugboat M/V Ralph F. The Cathy S-1 was a "pulling unit" barge; it was outfitted with a power winch for pulling flow pipe from oilfields located in the Atchafalaya Basin. The crew's job was to go by barge to the location canals in the oilfield each day and pull pipe from the swamp. A crewman would go ashore, hook the pulling winch to a section of pipe, and return to the deck to pull, cut, and stack the pipe on the barge for return to Settoon's headquarters. The barge moved from work site to work site regularly, sometimes stopping at three work sites in one day. When stopped, the barge was held stationary by the tugboat or was tied to trees on the land.

After working for Settoon for about two months, Domingue suffered an injury to his back. He asserts that he was injured while lifting pipe on the deck of the barge. Several doctors diagnosed the injury as a ruptured or herniated disc, which required surgery. After surgery on his back, the doctors discovered a knee injury, which had been masked by the back injury; they performed arthroscopic surgery to repair the knee. Due to these injuries, Domingue is now unable to perform the type of heavy manual labor he was performing at Settoon Construction.

Domingue received benefits for maintenance and cure during his medical treatment. He later sued Settoon Construction Company under the Jones Act, alleging that he was a seaman injured as a result of Settoon Construction Company's negligence. After a trial, the district judge entered judgment on the jury's verdict in favor of Domingue, awarding him $250,000 in damages. Defendant Settoon Construction appeals the district court's denial of its motion for judgment notwithstanding the verdict on a number of issues, including Domingue's status as a seaman and the Cathy S-1's status as a vessel under the Jones Act. The Defendant alleges numerous errors in the district court's admission and exclusion of evidence at the trial and in the court's refusal to submit the Defendant's proferred jury charge. We affirm.

Discussion

I. Motion for Judgment Notwithstanding the Verdict

A. Seaman and Vessel Status under the Jones Act

The Defendant appeals the district court's denial of his motion for judgment notwithstanding the verdict on the issue of Domingue's status as a seaman under the Jones Act. As a general matter, when reviewing a district court's denial of a motion for judgment n.o.v., we consider the evidence in the light most favorable to the party opposed to the motion, and reverse only if the facts and inferences point so strongly in favor of the movant that reasonable persons could not arrive at a verdict in favor of the non-movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). We have previously found that this "reasonable person" standard applies to the assessment

of seaman status. *See Golden v. Rowan Companies, Inc.*, 778 F.2d 1022, 1025-26 (5th Cir. 1985). The Supreme Court recently reaffirmed our duty to determine whether there is a reasonable basis to support the jury's finding of seaman status under the Jones Act. *See McDermott Internat'l. Inc. v. Wilander*, ___ U.S. ___, 111 S. Ct. 807, 818 (1991).

Domingue holds seaman status under the Jones Act if he has an employment-related connection to a vessel, *i.e.*, if he performs the work of a vessel. *Wilander*, 111 S.Ct.at 817. The defendant's primary contention[1] regarding Domingue's seaman status is that there is no reasonable basis to support the jury's finding of vessel status under the factors set forth in *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 831 (5th Cir. 1984).

Per *Bernard*, a structure is not a vessel if:

(1) it was constructed and used primarily as a work platform;

(2) it was moored or otherwise secured at the time of the accident; and

(3) its transportation function is merely incidental to its primary purpose of service as a work platform.

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[1] Initially, the Defendant also urged that Domingue was not a seaman because the nature of his work made him a longshoreman as a matter of law, and thus relegated him to remedies under the Longshore and Harbor Worker's Compensation Act rather than the more generous Jones Act remedies. The defendant necessarily abandoned this position, however, upon the publication of the Supreme Court's recent decision in *Southwest Marine, Inc. v. Gizoni*, 112 S.Ct. 486 (1991), issued during the pendency of this appeal.

The Defendant argues that the Cathy S-1's primary purpose was providing a work platform and that its transportation function was merely incidental to that purpose. The defendant also points out that the barge was not in motion at the time of the accident.

Upon reviewing the evidence in this case, we find that the district court properly deferred to the jury's finding on this issue. While the barge did serve as a work platform by providing the area on which to cut the pipe in stackable lengths, it also served to transport the crew and equipment from work site to work site, in addition to carrying the stacked pipe from the oilfields back to Settoon Construction's headquarters. The transportation function of the Cathy S-1 was a significant component of the vessel's purpose. Furthermore, evidence was presented at trial that the Cathy S-1 was not moored on land at the time of the accident, but was held stationary in the marsh by the tugboat Ralph F. There is, at a minimum, a rational basis for the jury's finding of vessel status under the *Bernard* factors. *Compare Sharp v. Johnson Brothers Corp.*, 917 F.2d 885, 888 (5th Cir. 1990).

The Defendant also argues that *Munguia v. Chevron Co., USA*, 768 F.2d 649 (5th Cir. 1985), mandates reversal on the issue of seaman status. In *Munguia*, this court affirmed a district court's entry of judgment n.o.v. on the issue of seaman status. The plaintiff in *Munguia* used one of a group of boats each day to transport himself to various stationary oilfield platforms in the Mississippi River, where he performed various construction jobs. Applying the oft-repeated factors enunciated in *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), the panel agreed with the district court that the plaintiff was not a

seaman as a matter of law because the plaintiff was not assigned to a fleet of vessels and he did not perform a substantial part of his work on a vessel. We fail to see any analogy to the present facts. Domingue was clearly assigned to a single vessel, the Cathy S-1, where he performed practically all of his assigned duties. His work aboard the Cathy S-1 contributed to the function of the vessel, which was to retrieve pipe from the oilfields in the marshland and return it to Settoon Construction's headquarters. *Munguia* is inapplicable, and Defendant's argument fails.

B. Jones Act Negligence, Unseaworthiness, and Causation

The defendant argues that the district court should have granted its motion for judgment n.o.v. on the issues of Jones Act negligence, unseaworthiness, and causation because there is no rational basis for the jury's finding on these issues. The plaintiff alleged negligence and unseaworthiness based on the absence of a crane on the Cathy S-1 to assist the crew in lifting the heavy pipe. The defendant contended at trial that the crew was not actually working on the Cathy S-1 on the date of Domingue's accident, but instead was working on a barge that did in fact have a crane. The crew foreman's log evidenced this theory of the facts. However, the plaintiff presented conflicting evidence. The logs of the tugboat Ralph F. show that the Cathy S-1 was engaged on the job to which Domingue was assigned on the date of his accident. The jury was entitled to judge the evidence and resolve the conflict. The district court did not err in denying the

Defendant's motion for judgment n.o.v. and entering the jury's verdict on these issues. *See Boeing v. Shipman*, 411 F.2d at 374.

II. July Charge

The Defendant claims error in the district court's refusal to submit the jury charge and interrogatories requested by the Defendant on the issue of seaman status. The court submitted six interrogatories to the jury, one of which asked the jury: "Was plaintiff a member of a crew of a vessel and a seaman for Jones Act purposes?" The court orally charged the jury on seaman and vessel status, comprehensively setting forth the factors to be considered by the jury.

The district court has broad discretion under Rule 49(a) of the Federal Rules of Civil Procedure to craft special verdicts. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1983). The district court's interrogatory and charge adequately presented the issue of seaman status to the jury. *see Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975). We find that the district court acted well within its discretion in its submission of the issue of seaman status to the jury.

III. Evidentiary Rulings

A. Exclusion of Evidence Regarding Benefits under the LHWCA

The defendant complains that the district court erred by improperly excluding evidence regarding the availability of benefits under the Longshoreman and Harbor

Worker's Compensation Act. Although the collateral source doctrine was not mentioned when the district court ruled on the admissibility of this evidence, the Defendant now claims that the district court's ruling was based on an erroneous interpretation of the collateral source doctrine. The Defendant argues that he was prejudiced by the exclusion of the evidence because Plaintiff's counsel, in opening argument, suggested that Domingue would go away "desperate" if the jury found that he was not a seaman.

Upon review of the record, we do not believe that the district court based its ruling on the collateral source doctrine. Because any evidence regarding longshoreman's benefits was properly excluded under Rule 403 of the Federal Rules of Evidence, we find no error in the district court's exclusion of this evidence. *See* Fed. R. Evid. 403; *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963).

B. Rulings Regarding Defendant's Rebuttal Testimony

The Defendant argues that the court committed reversible error in its rulings on several evidentiary matters presented by the Defendant's rebuttal testimony. The first of these rulings is the district court's requirement that the Defendant disclose the names of rebuttal witnesses and the substance of their testimony prior to the close of the Plaintiff's case. The Defendant had discovered the testimony on Friday prior to trial beginning on Monday; the testimony supported the Defendant's theory that Domingue was injured while exercising after work,

not during the performance of his duties for Settoon Construction. The Defendant intended to call a friend of Domingue's named Scott Landry to testify that Domingue was injured playing Football on the night of the claimed work-related injury. When defense counsel began cross-examining Domingue regarding this football game, the judge required counsel to disclose his evidentiary support for the questions on cross-examination. This disclosure gave Plaintiff's counsel an opportunity to call other witnesses to testify about Domingue's participation in the alleged football game.

On the second day of trial, the Defendant sought the court's permission to obtain videotaped depositions of two doctors who could answer hypothetical questions about football injuries. The Defendant proposed to take the depositions in the evening and present them later during the week of trial. The court disallowed this evidence because the Defendant had waited too long to develop the evidence.

On the second day of trial, both the Plaintiff and the Defendant issued subpoenas for witnesses to the alleged football games. The next day, a crowd of football players arrived at the courthouse. The judge briefly questioned each one of the group about his knowledge of Domingue's participation in the football games. The Defendant claims that the district court committed reversible error because the witnesses were questioned in the presence of one another, in violation of the rule of sequestration previously invoked at trial.

With regard to each of these evidentiary matters, we find that the district court properly exercised his discretion in controlling the presentation of evidence under

Rule 611 of the Federal Rules of Evidence. The court's exercise of control was reasonable, and it served the legitimate purposes enumerated in Rule 611. *See* Fed. R. Evid. 611(a).

C. Qualification of Plaintiff's Rehabilitation Expert

The Defendant claims that the district court erred by qualifying the Plaintiff's rehabilitation expert. Mr. Martinez was a licensed rehabilitation counselor, who had worked as a vocational rehabilitation consultant for twenty-two years. He testified about the types of work available to Domingue based on an evaluation of Domingue's medical records and educational background. We do not believe that the district court's decision to qualify him as an expert was clearly erroneous. *See U.S. v. Bourgeois*, 950 F.2d 980, 986-87 (5th Cir. 1992).

D. Admission of Videotaped Knee Surgery

The Defendant claims error in the district court's admission of a videotape of the arthroscopic surgery performed on the Plaintiff's knee. The Defendant argues that the district court abused its discretion by admitting the videotape in violation of Rule 403 of Federal Rules of Evidence. We review the district court's ruling for abuse of discretion. *See In Re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1153 (5th Cir. 1985).

In analyzing this evidence under Rule 403 of the Federal Rules of Evidence, we note that the tape itself is not particularly gory. It is a microscopic view from inside the knee during the procedure, which was not bloody

and did not involve any pain. The defendant argues, however, that its probative value was minimal because the Plaintiff was uncertain whether the knee was injured simultaneously with the back. At lease one doctor testified about the relationship between the knee and back injuries, and Plaintiff's counsel clarified during the trial that the Plaintiff was seeking damages for injury to his knee. We find no abuse of discretion by the district judge in admitting the videotape. *Compare In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d at 1153-54.

For the foregoing reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4420

CAROL J. DOMINGUE, JR.,
and CHRISTINE G. DOMINUE,

Plaintiffs-Appellees,

versus

SETTOON MARINE, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING

(April 15, 1992)

Before THORNBERRY, KING and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/ Homer Thornberry
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CAROL J. DOMINGUE, JR. AND CHRISTINE G. DOMINGUE	:	CIVIL ACTION
VERSUS	:	NUMBER 88-2398
SETTOON MARINE, INC., ET AL	:	JUDGE HUNTER

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MEMORANDUM RULING ON POST TRIAL MOTIONS

(Filed April 19, 1991)

Defendants have filed post trial motions for Judgment N.O.V. and or alternatively for a new trial in behalf of Setton Construction, Inc. and its Insurers.

The Insurers

On the day of the trial, defense counsel filed a motion to dismiss the insurers. This motion should have been properly raised as a motion for summary judgment under Rule 56(b) and (c) and noticed timely for a hearing prior to the trial date. The motion was referred to the Court. Plaintiff suggests that no motion for a directed verdict was made on the direct action statute and therefore defendant insurers have acquiesced in the verdict against them. We do not agree.

It is true that Fifth Circuit opinions consistently held that underwriters to a Marine P and I policy could be sued under the Direct Action Statute. This Court must

follow its interpretation of the statute "until Louisiana courts decide the matter differently." The Louisiana courts have now done so. *Deshoteles v. SHRM*, 538 So.2d 988, 982 (La. 1989); *Backhus v. Transit Casualty Co.*, 549 So.2d 283 (La. 1989). It is now clear that the Direct Action Statute does not apply to P & I underwriters. Accordingly, the judgment entered by this Court on the date of the jury verdict is amended by striking the words *"and its insurer"*. See judgment March 22, 1991.

The Court was careful to pose its interrogatories to the jury so as to avoid any mention of insurance. The caption utilized named no insurer. The record has not been transcribed, but my recollection is that the name "insurer" or the mention of "insurance" was not made in the presence of the jury.

Setton [sic] Construction, Inc.

The issues were submitted to the jury as to vessel status, work injury, Jones Act negligence, unseaworthiness and damages. The standard for judgment N.O.V. is the often repeated standard announced by the Court in *Boeing v. Shipman*, 411 F.2d 635 (5th Cir. 1969) (en banc). Credibility is a question for the jury. Here the jury obviously believed the plaintiff and not his first cousin. Defendant was just not able to find substantial support for the first cousin's testimony. The jury reasonably could have rendered its verdict either way. The motion for a judgment N.O.V. must be denied. It is.

As to the motion for a new trial, we conclude that there was substantial evidence to support the jury's verdict on all issues. As noted in the proceeding [sic] paragraph, substantial evidence supported each side's

contention on each and every issue. The motion for a new trial is denied.

Setton [sic] Marine, Inc.

There is no judgment against this defendant, but to clear the record, we grant their motion for a directed verdict.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana on this 19th day of April, 1991.

/s/ Edwin F. Hunter, Jr.
EDWIN F. HUNTER, JR.
UNITED STATES DISTRICT JUDGE
SENIOR STATUS

APPENDIX II

JURY CHARGES GIVEN

* * *

[p. 921] NOW, ON THIS FIRST QUESTION, WAS PLAINTIFF A MEMBER OF A CREW OF A VESSEL AND A SEAMAN FOR JONES ACT PURPOSES. THE KEY TO SEAMAN STATUS IS THE EMPLOYMENT RELATED CONNECTION TO A VESSEL IN NAVIGATION. IF PLAINTIFF WAS EITHER PERMANENTLY ASSIGNED TO SUCH A VESSEL OR PERFORMED A SUBSTANTIAL AMOUNT OF HIS WORK ABOARD SUCH A VESSEL, AND THE [p. 922] PERFORMANCE OF HIS DUTIES CONTRIBUTED TO THE FUNCTION OF THAT VESSEL OR TO THE ACCOMPLISHMENT OF THE VESSEL'S MISSION, THEN HE IS A SEAMAN FOR JONES ACT PURPOSES. THAT LEAVES US THE PROBLEM, YOU WILL NOTICE THE INTERROGATORY SAYS, WAS PLAINTIFF A MEMBER OF A CREW OF A VESSEL. NOW, WHAT IS A VESSEL? THE EXISTENCE OF A VESSEL IS A FUNDAMENTAL PREREQUISITE TO JONES ACT JURISDICTION, AND THE CORE OF THE TEST FOR SEAMAN STATUS. NEITHER CONGRESS NOR THE SUPREME COURT HAS DEFINED THE TERM VESSEL. AND THE TEAM IS INCAPABLE OF PRECISE DEFINITION, SO SAYS JUDGE EDITH JONES WHO WELL MAY BE SOON ON THE SUPREME COURT. YOU MAY CONSIDER MANY THINGS IN DETERMINING WHAT IS A VESSEL. I WILL READ YOU FROM A RECENT CASE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, WRITTEN BY JUDGE SMITH, OF WHICH JUDGE CLARK, THE CHIEF JUDGE OF THE FIFTH CIRCUIT, SERVED ON THAT

PANEL. AND IT SAYS THAT AS A GENERAL PRINCIPLE WHERE THE VESSEL STATUS OF AN UNCONVENTIONAL CRAFT IS UNSETTLED, THEN IT IS NECESSARY FOR THE JURY TO FOCUS UPON THE PURPOSE FOR WHICH THE CRAFT IS CONSTRUCTED AND THE BUSINESS IN WHICH IT IS ENGAGED. THE CASE LAW IS HEAVILY FILLED IN FAVOR OF CONFERRING SUCH STATUS UPON CRAFTS WHOSE PRIMARY MISSION IS THE TRANSPORTATION OF CARGO, EQUIPMENT OR PASSENGERS OVER NAVIGABLE WATERS. THE GREATER THE STRUCTURE'S RESEMBLANCE TO CONVENTIONAL SEAFARING CRAFT, THE GREATER THE ODDS OF SECURING VESSEL STATUS. IN LIGHT OF THIS BIAS FAVORING [p. 923] TRADITIONAL CRAFT, IT IS NOT SURPRISING THAT WE LOOK AT A NUMBER OF THINGS, AND OTHER THINGS IN DECIDING WHETHER OR NOT A VESSEL STATUS SHOULD BE GIVEN. YOU LOOK, TOO, DOES THE VESSEL HAVE ANY NAVIGATIONAL AIDS, OTHER LIFESAVING EQUIPMENT, BILGE PUMPS, CREW QUARTERS, REGISTRATION WITH THE COAST GUARD. IN ADDITION, THE INTENTION OF THE OWNER TO MOVE THE STRUCTURE ON A REGULAR BASIS, THE ABILITY OF THE SUBMERGED STRUCTURE TO BE REFLOATED, IF IT HAD BEEN SUBMERGED, AND THE HEIGHT OF THAT STRUCTURE, IF IT REMAINS STATIONARY FOR A LONG LENGTH OF TIME. STRUCTURES NEED NOT LACK ALL OF THE ABOVE MENTIONED ATTRIBUTES TO BE DEEMED VESSELS OR NONVESSELS. THE GREATER THE DEGREE AND THE ATTRIBUTES OF TRADITIONAL VESSELS THAT ANOTHER VESSEL MIGHT HAVE,

THEN THE GREATER CHANCE THAT THE JURY MAY DECIDE IT IS A VESSEL. NEVERTHELESS – IN FACT, THE FIFTH CIRCUIT HAS STATED ON NUMEROUS TIMES THAT A STRUCTURE WHOSE PURPOSE OR PRIMARY BUSINESS IS NOT NAVIGATION MAY, NONETHELESS, SATISFY THE JONES ACT VESSEL REQUIREMENT, IF AT THE TIME OF THE WORKER'S INJURY, THE STRUCTURE WAS ACTUALLY ENGAGED IN NAVIGATION. HOWEVER, NOW, CERTAIN THINGS MAY BE CONSIDERED AS TO WHETHER OR NOT THIS PLATFORM WILL QUALIFY AS A JONES ACT VESSEL. A SURVEY OF CASE LAW DEMONSTRATES THREE COMMON ATTRIBUTES FOR NONVESSELS. THIS IS FOR NONVESSELS. ONE, THE STRUCTURE IS CONSTRUCTED TO BE USED PRIMARILY AS A WORK PLATFORM. THE STRUCTURE IS MOORED OR OTHERWISE SECURED AT [p. 924] THE TIME OF THE ACCIDENT. AND ALTHOUGH THE PLATFORM IS CAPABLE OF MOVEMENT AND IS SOMETIMES MOVED ACROSS NAVIGABLE WATERS IN THE COURSE OF NORMAL OPERATIONS, ANY TRANSPORTATION FUNCTION IS MERELY INCIDENTAL TO THE PLATFORM'S PRIMARY PURPOSE. YOU, AND YOU ALONG [SIC], ARE GOING TO HAVE TO DETERMINE WHETHER THIS IS A VESSEL.

* * *

APPENDIX III

INTERROGATORIES GIVEN
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CAROL J. DOMINGUE, JR., ET AL : CIVIL ACTION
VERSUS : NUMBER 88-2398
SETTOON MARINE, INC., ET AL : JUDGE HUNTER

INTERROGATORIES

(Filed March 22, 1991)

1. Was plaintiff a member of a crew of a vessel and a seaman for Jones Act purposes?

Answer Yes or No ___yes___

Instructions:

The issue of seaman status in cases like this is far from settled. An appellate court or even the Supreme Court of the United States might hold as a matter of law your findings was [sic] erroneous. Therefore regardless of how you answer Interrogatory No. 1, you are then to proceed to answer the other Interrogatories as indicated. That way, the case would not necessarily have to be tried again if your answers to Interrogatory Number One (1) was later held to be erroneous as a matter of law.

2. Was Cathy-S-1 unseaworthy in the manner claimed by the plaintiff and was such unseaworthiness a legal cause of damage to the plaintiff?

Answer Yes or No ___yes___

3. Was Settoon Construction, Inc. negligent in the manner claimed by plaintiff and was such negligence a legal cause of damage to plaintiff?

Answer Yes or No ___yes___

Instructions:

If you have answered both Interrogatories No. 2 and 3 in the negative, then go no further. The Chairperson should sign this verdict and notify the Marshal that a verdict has been reached. But, if you answer either Interrogatory No. 2 or 3 in the affirmative as yes, then proceed to answer remaining questions.

4. If you answered "Yes" to Question 2 and/or 3, do you find that the plaintiff himself was negligent and that such negligence was a legal cause of plaintiff's own damage?

Answer Yes or No ___yes___

5. If you answered "Yes" to Question 4, what proportion or percentage of plaintiff's damages do you find from a preponderance of the evidence was caused by his own negligence?

Answer Yes or No ___10%___

6. If yo [sic] answered "Yes" to Questions 2 or 3, what sum of money do you award for the following:

(Answer in dollars)

(a) Past, present, and future pain and suffering and mental anguish $ 100,000

(b) Loss of earnings, past and future $ 150,000

DATE: 3-22-91 /s/ Bennie Jackson
CHAIRPERSON

APPENDIX IV

REQUESTED INSTRUCTIONS (WRITTEN)

JURY CHARGE NO. ___

Certain floating work platforms will not qualify as "vessels in navigation" for purposes of Jones Act seaman status.

Gremillion v. Gulf Coast Catering Co., 904 F.2d 290 (5th Cir. 1990).

JURY CHARGE NO. ___

There are a number of factors you must consider in determining whether or not the barge was a "vessel in navigation", as opposed to a "mere floating work platform;" however, no single factor is controlling on your decision. You must consider all of the factors as a whole. Some of those factors are:

Whether or not it has navigational lights;

Whether or not it has life saving equipment;

Whether or not it is officially registered with the United States Coast Guard;

Whether or not it has any deck winches;

Whether or not it has an anchor;

Whether or not it has an engine or other motive power of its own;

Whether or not it has a pointed bow;

Whether or not it has a raked bow;

Whether or not it was moored or otherwise secured at the time of the alleged accident, as opposed to being underway at the time;

Whether or not it has sleeping quarters;

Whether or not it has a galley or kitchen;

Whether or not it has any kind of a shelter on deck;

Whether or not it was primarily designed or used as a work platform, as opposed to being designed or used primarily for the transportation of persons and equipment over navigable waters.

JURY CHARGE NO. ___

There must be a definite and permanent connection between the worker and a "vessel in navigation" in order for him to be a "seaman."

McDermott International, Inc. v. Wilander, 59 U.S. Law Week 4096 (2/19/91); *quoting, Maryland Casualty Company v. Lawson,* 94 F.2d 190, 192 (5th Cir. 1938).

JURY CHARGE NO. ___

In determining whether or not the plaintiff is a seaman, some of the factors you should consider, no single one of which is controlling, are:

Whether or not the worker sleeps aboard the vessel as opposed to going home every night;

Whether or not the worker takes his means [sic] aboard the vessel as opposed to eating on shore;

And whether or not the vessels, if there is more than one, are under common ownership and control. Even a worker who spends the majority of his time on barges or vessels is not a "seaman" if the vessels are not under common ownership and control.

White v. Valley Line Co., 736 F.2d 304 (5th Cir. 1984).

JURY CHARGE NO. ___

In order for a worker to be a seaman, he must have such a connection to the vessel in navigation that he should fairly be considered a sea-based employee, as opposed to a land-based maritime worker.

McDermott International, Inc. v. Wilander, 59 U.S. Law Week 4091, 4094, 4095 and 4096.

APPENDIX V

IN LIMINE RULING ON LONGSHORE BENEFITS

[p. 8] MR. NAIL: THE PLAINTIFF WOULD ASK THAT ANY MENTION OF COLLATERAL SOURCE BENEFITS, THAT BEING LONGSHOREMAN AND HARBOR WORKERS' BENEFITS OR SOCIAL SECURITY BENEFITS, BE SUPPRESSED.

THE COURT: WELL, THERE IS NO QUARREL ABOUT THAT, IS THERE?

MR. ALEXANDER: THERE IS CERTAINLY NO QUARREL AS FAR AS THE CASE IN CHIEF IS CONCERNED. BUT IF MR. DOMINGUE SAYS I DIDN'T HAVE ENOUGH MONEY TO GO TO THE DOCTOR AND SO ON, THEN THERE IS.

THE COURT: WELL, IF THAT GOES INTO EVIDENCE, I WOULD AGREE YOU WOULD BE ABLE TO GET THAT IN. BUT I CAN'T PASS ON THESE SPECIFIC THINGS UNTIL THEY COME UP. NONE OF THE FACTS ARE IN FRONT OF ME.

MR. FENET: JUDGE, THIS IS THE CASE, YOU REMEMBER, THAT WE HAD THREE OR FOUR MOTIONS FOR SUMMARY JUDGMENT ON SEAMAN STATUS. AND, IN FACT, YOU ORDERED LIBERTY MUTUAL TO START PAYING.

THE COURT: WELL, THAT WAS SORT OF AN UNHOLY SITUATION.

* * *

EXCERPT OF PLAINTIFF'S OPENING STATEMENT

[p. 74] IF IT IS AN INADEQUATE CREW YOU FIND, YOU SEE, WHERE THE SUPERVISION DOESN'T CHOOSE A SAFE MEANS OF WORK, OR SAFER MEANS OF WORK, AND THEN YOU ARE GOING TO BE CONFRONTED WITH THE QUESTION FOR YOU TO DECIDE WHETHER OR NOT HE WILL BE COMPENSATED OR WHETHER OR NOT HE WILL BE LEFT IN THE CONDITION THAT HE IS IN NOW, DESPERATE. THANK YOU. I AM SURE YOU WILL DO THE RIGHT THING.

---

* * *

REQUESTED INSTRUCTION

[p. 227] MR. ALEXANDER: I AM SORRY. I HAVE ONE MORE MATTER, YOUR HONOR. WITH REGARD TO LONGSHOREMAN STATUS BENEFITS, I WOULD SUBMIT THAT THE DOOR HAS BEEN OPENED TO THAT IN OPENING STATEMENT OF PLAINTIFF, IN WHICH THE JURY WAS TOLD BY MR. NAIL THAT THEY HAD TO MAKE THE DECISION OF WHETHER OR NOT THEY ARE GOING TO COMPENSATE MR. DOMINGUE OR SEND HIM AWAY IN THE CONDITION HE IS IN NOW.

THE COURT: WHAT DO YOU WANT TO DO?

MR. ALEXANDER: I THINK THAT CALLS FOR AN INSTRUCTION. AND I THINK THAT OUR FIFTH AND SEVENTH AMENDMENT RIGHT TO DUE PROCESS JURY TRIAL WILL BE DENIED IF –

THE COURT: I NEVER HEARD THAT RIGHT BEFORE.

MR. ALEXANDER: I AM KNOWN FOR MY NOVEL –

THE COURT: NO, I HAVE HEARD ENOUGH, MR. ALEXANDER.

APPENDIX VI

REQUESTED INTERROGATORIES (WRITTEN)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE DIVISION

CAROL J. DOMINGUE, JR.	:	CIVIL ACTION
AND CHRISTINE G. DOMINGUE	:	NO. CV88-2398
VERSUS	:	JUDGE
	:	EDWIN HUNTER
SETTOON MARINE, INC.,	:	MAGISTRATE
ET AL.	:	METHVIN

INTERROGATORIES TO THE JURY

1. Do you find that the plaintiff, Carol J. Domingue, Jr., had an employer-employee relationship with Settoon Marine, Inc.?

___ YES ___ NO

2. Do you find that the plaintiff, Carol J. Domingue, Jr., suffered any employment-related injury on or about July 29, 1988?

___ YES___ NO (If you answered no to this question, go on to question no. 6.)

3. Do you find that the plaintiff, Carol J. Domingue, Jr., suffered an employment-related injury to his lower back on or about July 29, 1988?

___ YES ___ NO

4. do you find that the Plaintiff, Carol J. Domingue, Jr., suffered an employment-related injury to his neck on or about July 29, 1988?

___ YES ___ NO

5. Do you find that the plaintiff, Carol J. Domingue, Jr., suffered an employment-related injury to his knee on or about July 29, 1988?

___ YES ___ NO

6. Do you find that on or about July 29, 1988, plaintiff, Carol J. Domingue, Jr., was employed as a longshoreman or other person engaged in longshore operations?

___ YES ___ NO

7. Do you find that the plaintiff, Carol J. Domingue, Jr., on or about July 29, 1988, was employed primarily loading or unloading?

___ YES ___ NO

8. Do you find that the plaintiff, Carol J. Domingue, Jr., on or about July 29, 1988, was employed as a harbor worker?

___ YES ___ NO

9. Do you find that the plaintiff, Carol J. Domingue, Jr., on or about July 29, 1988, was a land-based maritime employee?

___ YES ___ NO

10. Do you find that the plaintiff, Carol J. Domingue, Jr., on or about July 29, 1988, was a sea-based maritime employee?

___ YES ___ NO

11. Do you find that the plaintiff, Carol J. Domingue, Jr., on or about July 29, 1988, had a definite and permanent connection to the tug "RALPH F,"so as to be a sea-based member of its crew?

___ YES ___ NO

12. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had its own navigational lights?

___ YES ___ NO

13. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had its own life-saving equipment?

___ YES ___ NO

14. Do you find that the flat-deck barge "KATHY S-1" on or about July 29, 1988, was officially registered with the United States Coast Guard?

___ YES ___ NO

15. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had any deck winches?

___ YES ___ NO

16. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had an anchor?

___ YES ___ NO

17. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had an engine or other motive power of its own?

___ YES ___ NO

18. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had a pointed bow?

___ YES ___ NO

19. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had a raked bow?

___ YES ___ NO

20. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, was moored or otherwise secured at the time of the alleged accident, as opposed to being underway at the time?

___ YES ___ NO

21. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had sleeping quarters?

___ YES ___ NO

22. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had a galley or kitchen?

___ YES ___ NO

23. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, had any kind of shelter on deck?

___ YES ___ NO

24. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, was primarily designed as a work platform?

___ YES ___ NO

25. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, was primarily used as a work platform?

___ YES ___ NO

26. Do you find that the flat-deck barge "KATHY S-1," on or about July 29, 1988, was designed or used primarily for the transportation of persons or equipment over navigable waters.

___ YES ___ NO

27. Do you find that the flat-deck barge "KATHY S-1," was at the time the plaintiff alleges to have suffered an accident, a "vessel in navigation?"

___ YES ___ NO

* * *

APPENDIX VII
REQUESTED INTERROGATORY (ORAL)

* * *

[p. 808] MR. FENET: YOUR HONOR, JUST ONE MORE EXCEPTION. AND, AGAIN, THIS IS A REURGING OF A REQUEST IF IT HAS NOT BEEN MADE ON THE RECORD. AGAIN, WE WOULD ASK FOR A SPECIFIC LINE IN THIS INTERROGATORY, ONE LINE THAT WOULD SAY, WAS CAROL DOMINGUE INJURED ON THE BARGE CATHY S-1[SIC] ON FRIDAY, JULY 29, 1988.

THE COURT: WELL –

MR. FENET: YOUR HONOR, WE THINK THAT THE KEY [p. 809] ISSUE IN THIS CASE HERE, AND THE WHOLE CASE IS GOING TO RISE AND FALL ON THE CREDIBILITY OF THE PLAINTIFF. AND IF WE COULD HAVE AN INTERROGATORY TO THAT EFFECT, HIS WHOLE CASE IS THAT HE GOT HURT ON FRIDAY, THE 29TH OF JULY. THAT HE WAS AT THE TABLE. HE WAS PICKING UP PIPE. AND WE SUGGEST THAT THE EVIDENCE IN THE RECORD IS THAT THAT BARGE WAS NOT BEING USED THAT DAY.

THE COURT: THE DEFENDANTS HAVE SUBMITTED, I THINK, OH, I DON'T KNOW, IT IS A WILD GUESS, BUT TWENTY-FIVE TO THIRTY INTERROGATORIES TO BE SUBMITTED TO THE JURY. THE COURT FEELS THAT QUESTIONS NUMBER TWO AND THREE MAKE IT UNNECESSARY FOR ME TO ASK THEM THE QUESTION JUST SUGGESTED BY MR. FENET. NUMBER TWO SAYS, IN EFFECT, WAS

UNSEAWORTHINESS A LEGAL CAUSE OF THE DAMAGE TO THE PLAINTIFF. NUMBER TWO SAYS, WAS NEGLIGENCE A LEGAL CAUSE OF THE DAMAGE TO THE PLAINTIFF. IF THERE WAS NO ACCIDENT, THEN THAT'S ALL SHE WROTE. AND THAT IS WHAT YOU CAN TELL THE JURY. ALL RIGHT. OFF THE RECORD.

* * *

APPENDIX VIII
RULING ON EXHIBIT P-14

* * *

[p. 704] MR. NAIL: IN CONNECTION WITH THE WITNESS' TESTIMONY I OFFER, PRODUCE AND FILE INTO EVIDENCE THE BOAT LOGS OF THE RALPH F.

MR. ALEXANDER: OBJECTION, YOUR HONOR.

MR. NAIL: ON JULY 18TH THROUGH JULY 31ST, 1988.

MR. ALEXANDER: I DON'T BELIEVE THE AUTHOR OF THOSE HANDWRITTEN RECORDS HAS BEEN IDENTIFIED.

THE COURT: WHO DO WE HAVE TO CALL TO IDENTIFY THEM? WERE THEY TENDERED TO YOU AS THE RECORDS?

MR. NAIL: THEY WERE TENDERED TO ME IN RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS, YOUR HONOR.

THE COURT: AND THAT IS WHAT WAS TENDERED TO[p. 705] YOU? THEY WILL BE RECEIVED INTO EVIDENCE.

MR. NAIL: PLAINTIFF'S EXHIBIT 14 IN GLOBO (WHEREUPON SAID LOGS MARKED P-14 FOR IDENTIFICATION WERE RECEIVED IN EVIDENCE AND FILED WITH THE CLERK OF COURT.)

* * *

[p. 930] BY MR. ALEXANDER:

Q MR. GROS, PLACED IN EVIDENCE WHEN MR. NAIL WAS QUESTIONING YOU JUST NOW, WAS PLAINTIFF'S EXHIBIT 13 IN GLOBO, WHICH IS THREE PAGES THAT SHOW BOAT LOG, SETTOON MARINE, INC.

A UH-HUH.

Q MY QUESTION IS, AT ANY TIME, AT THIS TIME WHEN YOU WERE WORKING THE CONOCO JOB WERE YOU AN EMPLOYEE OF SETTOON MARINE, INC.?

A NO, SIR.

Q ARE YOU FAMILIAR WITH THESE RECORDS?

A NO SIR. I AM NOT AT ALL.

Q HAD YOU EVER SEEN THEM?

A I WAS KIND OF SURPRISED WHEN I SAW THEM.

Q HAD YOU EVER SEEN THEM BEFORE?

A NO, SIR.

Q NOW, YOU WERE WORKING, YOU WERE SUPERVISING WORKERS WHO WORKED IN CONNECTION WITH THIS PIPE CLEAN-UP OPERATION, AND THERE WAS A COUPLE OF MATERIALS BARGES THAT WERE BEING USED THERE, CORRECT?

A YES, SIR.

Q WERE THERE ANY LOGS KEPT ON THOSE BARGES OUT IN THE FIELD?

A NOT BY US. NOT BY THE CONSTRUCTION CREW. NOT BY MYSELF.

Q [p. 931] DO YOU KNOW WHO DID THESE?

A NO.

Q DID ANYONE ON YOUR CREW, OR ANY SUPERVISOR AROUND YOU, TO YOUR KNOWLEDGE, FILL THESE OUT?

A NO, SIR. THAT WOULDN'T HAVE ANYTHING TO DO WITH THE CONSTRUCTION CREW. NORMALLY, THAT IS PEOPLE AFFILIATED WITH THE BOATS.

Q WOULD YOU KNOW WHETHER THESE WERE DONE BY THE INSIDE OFFICE PEOPLE WHO NEVER CAME OUT IN THE FIELD?

A I WOULDN'T KNOW.

Q I AM GOING TO ASK YOU TO LOOK AT THE ONE FOR THE WEEK STARTING JULY 25, 1988, AND ASK YOU IF IT DOESN'T JUST GIVE THE SAME TUG AND THE SAME BARGE FOR EVERY DAY?

A YES. IT IS REPETITIOUS. IT SAYS THE EXACT SAME THING FOR EVERY DAY OF THE WEEK.

Q EVERY DAY OF THE WEEK. WHAT ABOUT THE TIMES?

A YES. 5:00 P. M., 5:00 P. M., RIGHT. 7:00 IN THE MORNING TO 5:00 P. M., RIGHT.

Q WHAT ABOUT THE LOCATION?

A YEAH.

Q WERE YOU WORKING AT THAT LOCATION ON THAT WEEK? WHO WENT THROUGH THERE AND WROTE IT ALL DOWN ON ONE OF THESE BOARDS OVER HERE?

THE COURT: DOES IT MAKE ANY DIFFERENCE, MR. ALEXANDER, WHICH ONE OF THE TUGS WAS PUSHING IT ON A GIVEN [p.932] DAY? DOES IT REALLY MAKE ANY DIFFERENCE?

MR. ALEXANDER: NO. WHAT MAKES A DIFFERENCE AS FAR AS I AM CONCERNED, YOUR HONOR, IS WHAT SEEMS TO BE A SUGGESTION ON CROSS-EXAMINATION OF THIS WITNESS, IS THAT THE CATHY,[SIC] THAT HE WAS INCORRECT WHEN HE STATED UNEQUIVOCALLY THAT THE CATHY[SIC] S WAS TIED UP, AND THE SUGGESTION THAT THIS SOMEHOW MEANS THAT, IN FACT, THE CATHY[SIC] S WAS STILL ON THIS JOB AND BEING USED.

* * *